BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA STEWART	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 225,039 & 227,638
SABRELINER INDEPENDENCE	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed from an Award entered by Administrative Law Judge Jon L. Frobish on August 20, 1999. The Appeals Board heard oral argument on December 15, 1999.

APPEARANCES

Patrick C. Smith of Pittsburg, Kansas, appeared on behalf of claimant. Leigh C. Hudson of Fort Scott, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This appeal involves two claims consolidated for trial. In Docket No. 225,039 claimant alleges injury to her bilateral upper extremities, shoulders and neck through a series of accidents beginning in November of 1996 and continuing each and every working day through September 2, 1997, her last day worked. The ALJ found that all of claimant's upper extremity problems were due to a previous injury and that claimant did not suffer a new injury or an aggravation of her preexisting carpal tunnel syndrome during the period alleged in this claim. Because the settlement of the previous injury foreclosed future medical treatment, the ALJ denied claimant medical treatment for her ongoing symptoms. As he found the claim was not compensable, the ALJ did not address any of the other issues raised.

Claimant contends she is entitled to an award based upon her functional impairment of 15 percent to the body as a whole. No work disability is claimed. Respondent contends claimant settled her bilateral upper extremity claims and the ALJ's Award should be affirmed. The issues for Appeals Board review in Docket No. 225,039 are: (1) Whether claimant suffered personal injury by accident on the dates alleged, (2) whether the alleged accidents arose out of and in the course of claimant's employment with respondent, (3) whether timely notice of accident was given, (4) the nature and extent of claimant's disability, (5) whether claimant is entitled to an unauthorized medical allowance and (6) whether claimant is entitled to an award for future medical.

In Docket No. 227,638 claimant alleges injury to her back through a series of accidents beginning on or about August of 1997 and continuing each and every working day through her last day worked. The ALJ found claimant had a preexisting arthritic condition in her spine and did not sustain an accidental injury or an aggravation of her preexisting condition at work. Because of this conclusion the ALJ did not reach the other issues.

Claimant argues that she was terminated because respondent could not accommodate the restrictions given to her for her back condition and that, therefore, she is entitled to a work disability in this docketed claim. The issues in Docket No. 227,638 are the same as in Docket No. 225,039, specifically, (1) whether claimant met with personal injury by a series of accidents on the dates alleged (2) whether the alleged back injury arose out of and in the course of her employment, (3) notice, (4) nature and extent of disability, (5) future medical, and (6) unauthorized medical.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DOCKET NO. 225,039

After reviewing the record and considering the arguments, the Appeals Board finds claimant has a 15 percent permanent partial general disability based on functional impairment for the series of accidental injuries to claimant's bilateral upper extremities, shoulders and neck.

Findings of Fact

(1) In 1987 claimant began working for a predecessor corporation of respondent.

(2) Claimant had a previous claim against respondent for upper extremity injuries which alleged an accident date in 1994. That case, which was Docket No. 199,968, was settled on November 19, 1996. From the time claimant returned to work following her surgery until the time she settled her claim, claimant was working light duty jobs. The settlement included all claims through the date of the settlement. The settlement was a lump-sum compromise of all issues and included a release of liability for future medical

compensation. It was not based upon any particular percentage of impairment or disability, and the settlement did not separate out the amounts paid for disability versus the other benefits claimant may have been entitled to under the Workers Compensation Act.

(3) After the settlement claimant was returned to jobs she had done before her first injury and surgery. Claimant described her job duties after her settlement with respondent as more repetitious and heavier. These jobs also required more pulling and lifting. The symptoms in her hands, arms and shoulders increased. About two months after the settlement, claimant reported her symptoms to the safety manager, Jimmy Johnson. He provided her with braces to wear on her arms. These braces were replaced several times because she would wear them out working. During this period claimant was moved around between jobs but this was not done as an attempt at accommodation. All of these several jobs caused her problems.

(4) After going back and talking with Jimmy Johnson again, claimant was sent to the company physician, Dr. George H. Mears. Claimant was also seen by Dr. Harold Goldman and Dr. Peter Snitovsky. She was given lifting restrictions but, according to claimant, the company did not change her job duties to comply with these restrictions.

(5) The prior workers compensation claim was for injury to her upper extremities and shoulders. She was diagnosed with and had surgery for carpal tunnel syndrome. This claim is for injury to claimant's neck, shoulders, arms and hands. Claimant testified that her right sided symptoms are worse than those on the left side.

(6) Claimant was examined by board certified orthopedic surgeon William D. Smith, M.D., at the request of her attorney. Dr. Smith first saw claimant on October 2, 1995 and opined claimant had a 15 percent functional impairment to the body as a whole. He next saw claimant on February 16, 1998 for neck, right shoulder and wrist pain. He diagnosed claimant with a chronic overuse syndrome of her wrists following carpal tunnel releases, chronic impingement syndrome of the right shoulder and chronic cervical spondylosis. This rating consisted of 4 percent for the cervical spondylosis, 4 percent for the right shoulder chronic impingement syndrome and 7 percent for the right and left wrists. According to Dr. Smith, the 15 percent impairment rating he gave following his February 16, 1998 examination of claimant was intended to be in addition to the 15 percent permanent impairment rating he gave in 1995. His restrictions in 1998 were the same that he gave in 1995 and included limited sitting, standing and walking to 6 hours and driving to 2 hours; lifting and carrying continuously up to 10 pounds, occasionally 10 to 30 pounds, never over 30 pounds; no climbing, kneeling, crouching or crawling; may occasionally push/pull, balance, bend/stoop and reach above shoulder; frequently grasp and manipulate objects; and, a total restriction against working at unprotected heights or with moving machinery. Although these work restrictions were first issued on October 2, 1995, they were never implemented by respondent.

(7) Dr. Vito J. Carabetta is a physician specializing in physical medicine and rehabilitation. He examined claimant at the request of respondent's insurance carrier on August 10, 1998. In his opinion, claimant suffered from bilateral tendinitis which was a component of her preexisting carpal tunnel syndrome. He also opined that claimant did not sustain injury or aggravation from her work activities after the November 19, 1996 settlement of her prior claim. Her symptoms were worsened because she had not been given appropriate restrictions following her release from the prior injury and surgery. The worsening symptoms were an indication that she was performing work activities that she was not really capable of doing. He would restrict claimant from repetitive grasping and gripping but would not give claimant any additional functional impairment beyond that which had preexisted the dates of the alleged series of accidents in this case.

(8) Dr. Michael D. David, who has been claimant's family physician since 1992, also testified that claimant's work activities following her release to return to work after bilateral carpal tunnel surgery, caused a permanent worsening of her upper extremity injuries.

Conclusions of Law

(1) Respondent contends claimant failed to provide timely notice of her accidental injury. Absent extenuating circumstances, K.S.A. 44-520 requires notice of accidental injury be given to the employer within 10 days. In this case, claimant's date of accident is found to be September 2, 1997, her last day worked.[1] Claimant testified that the safety manager, Jimmy Johnson, had knowledge of her symptoms and, in addition, claimant had discussed her injury with Mr. Johnson on more than one occasion. These conversations resulted in claimant being referred to the company physician but claimant's job duties were not modified to accommodate her injury other than Mr. Thomas and Ms. Edens testified that a few weeks before she was terminated claimant was told to seek help with the heavier lifting. As this all occurred before claimant's last day worked, and therefore within 10 days of the accident, the Appeals Board finds claimant gave timely notice of accident.[2]

(2) Respondent also denies claimant has proven she suffered personal injury by accident arising out of and in the course of her employment. Respondent contends claimant's injury is not related to the alleged series of accidents at work but, instead, is the result of her prior injury which was settled. Generally, workers compensation laws require an employer to compensate an employee for any new personal injury or aggravation of a preexisting condition that is incurred through accident arising out of and in the course of

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[1] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[2] Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999).

employment.[3] The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[4]

(3) Claimant's injuries were not caused solely by the specific series of accidents described, some impairment obviously preexisted, but the repetitive work she performed for respondent on a daily basis aggravated the preexisting condition. The question in this case is not whether the accidents caused the conditions, but whether the accidents aggravated or accelerated the preexisting condition.[5] An injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6]

(4) The evidence supports the conclusion that claimant suffered an aggravation of her preexisting condition in her upper extremities, shoulders and neck. The only permanent functional impairment opinion is that given by Dr. Smith. Respondent argues that Dr. Smith's opinion is not credible because he gave the same 15 percent rating for the prior injury that he gave for this injury and his report did not explain that the 15 percent rating was in addition to the 15 percent that preexisted. However, this was covered at Dr. Smith's deposition and the Board accepts his testimony in this regard. As Dr. Smith's is the only rating in evidence, the Appeals Board will adopt his 15 percent general body impairment rating as its finding of permanent disability. The Appeals Board is not satisfied with Dr. Carabetta's explanation that even though claimant's work activities were inappropriate and beyond what should have been her restrictions, and even though these activities were causing her increased chronic symptoms, he did not think there was a new injury or an aggravation of her preexisting condition. Furthermore, the Appeals Board believes Dr. Smith was in a better position to determine if there was a new injury or an aggravation of the preexisting condition because he had the opportunity to examine claimant in both 1995 and 1998, whereas Dr. Carabetta saw claimant for the first time in 1998.

(5) Finally, claimant is entitled to the authorized medical expenses, an unauthorized medical allowance up to the statutory maximum, and future medical upon application to and approval of the Director.[7]

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[3] K.S.A. 1996 Supp. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987).

[4] Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

[5] Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[6] Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

[7] *See* Ferrell v. Day and Zimmerman, Inc., 223 Kan. 421, 573 P.2d 1065 (1978).

DOCKET NO. 227,638

After reviewing the record and considering the arguments, the Appeals Board finds claimant has proven a 62.5 percent work disability.

Findings of Fact

(1) As part of the findings in Docket No. 227,638, the Board hereby incorporates by reference all findings made in Docket No. 225,039.

(2) In August of 1997 claimant injured her back at work lifting and moving trays.

(3) She reported her low back pain to respondent's safety manager, Jimmy Johnson. Claimant related these symptoms were due to the lifting, bending and stooping she was doing while working with the trays. Claimant's supervisor, Stephanie Edens, likewise testified that claimant gave notice of this injury.

(4) Claimant sought treatment on her own with her family doctor, Dr. Michael D. David, who is board certified in family practice.

(5) Claimant continued to perform her regular work duties from August until September 2, 1997 when she was terminated. During this time her work aggravated and made her symptoms worse.

(6) Claimant was eventually given restrictions by Dr. David which she took to her employer. Respondent was unable or unwilling to accommodate those restrictions and on September 2, 1997 claimant was placed on an unpaid leave of absence. She has not worked since she was placed on leave of absence, but her fringe benefits have continued.

(7) Mr. Thomas testified that the lifting restrictions could have been accommodated but the restrictions against prolonged sitting could not be accommodated and that was the reason for claimant being put on leave of absence.

(8) Dr. David, who has been claimant's family physician since 1992, first saw claimant for low back complaints in 1993. In his opinion claimant's low back condition was aggravated by her work activities during July and August of 1997, and through her last day worked.

(9) Claimant was examined by board certified orthopedic surgeon Dr. Frank H. Ise on September 22, 1997 at the request of claimant's counsel. Dr. Ise found claimant to have a 5 percent functional impairment as a result of her work related back injury. He also recommended work restrictions which limited sitting to 8 hours with instructions to get up and move about every hour, standing to 1 hour, walking to 8 hours and driving to 2 hours; occasionally lift up to 10 pounds, never over 10 pounds; frequently carry up to 10 pounds

but never over 10 pounds; may occasionally bend/stoop and crouch; and, may frequently reach above shoulder level.

(10) Dr. Carabetta gave an opinion that claimant's work activities made claimant aware of her back condition but that her back condition was not aggravated by her work activities. Dr. Carabetta, however, did not do a complete examination of claimant's back. He relied instead on a review of medical records in forming his opinions.

(11) The only task loss opinion in evidence comes from Dr. Ise. After reviewing claimant's 15 year work history, Dr. Ise opined claimant had lost 25 percent of those tasks.[8]

(12) As of the close of evidence in this case claimant was not working. Accordingly, her actual wage loss is 100 percent.

(13) No percentage of preexisting impairment has been established.[9]

Conclusions of Law

(1) Claimant suffered an aggravation to a preexisting degenerative or arthritic condition in her low back through a series of accidents that occurred from August through September 2, 1997. Claimant left work due to this injury. With the last date worked being the date of accident, notice was timely.

(2) Because this is an "unscheduled" injury, claimant's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in

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[8] A task list was identified at page 4 of Dr. Ise's June 17, 1999 deposition as Claimant's Exhibit 2, pages A through H. However, the transcript has no exhibits attached and the Index shows none were marked or offered. It is assumed that Dr. Ise was testifying about the task list entitled Task Performance Capacity Assessment which is Claimant's Exhibit 2 to the April 19, 1999 deposition of Barbara Stewart. That is the only comprehensive task list in the record.

[9] K.S.A. 44-501(c).

> excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above statute, however, must be read in light of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(3) The Appeals Board finds that claimant has made a good faith effort to find appropriate employment and that she had not refused to work. Therefore, neither Foulk nor Copeland is appropriate to limit claimant's benefits to her functional impairment rating. Claimant's medical restrictions severely restrict the number of jobs that she can perform. Also, the area where claimant lives does not offer the wide variety of jobs that exist in more metropolitan areas. Further, there is no evidence that claimant did not apply for any appropriate jobs that would have paid a comparable wage. Under K.S.A. 44-510g, the insurance carrier had the opportunity to provide vocational rehabilitation and job placement assistance to claimant to assist her in obtaining employment but chose not to. When considering all the circumstances, claimant's efforts to find appropriate employment were reasonable and satisfy the good faith requirement set forth in Copeland.

(3) Averaging the 100 percent wage difference and the 25 percent task loss yields a 62.5 percent permanent partial general disability.

(4) Finally, claimant is entitled to the authorized medical expenses, an unauthorized medical allowance up to the statutory maximum, and future medical upon application to and approval of the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated August 20, 1999, should be, and is hereby, reversed.

Docket No. 225,039

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Barbara

Stewart, and against the respondent, Sabreliner Independence, and its insurance carrier, Travelers Insurance Company, for a series of accidents through September 2, 1997, and based upon an average weekly wage of $441.85 for 62.25 weeks at the rate of $294.58 per week or $18,337.61, for a 15% permanent partial general disability, and is ordered paid in one lump sum less any amounts previously paid.

Respondent is ordered to pay all reasonable and related medical expenses.

Future medical is awarded upon proper application to and approval by the Director.

An unauthorized medical allowance of up to $500 is awarded upon presentation to respondent of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

DOCKET NO. 227,638

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Barbara Stewart, and against the respondent, Sabreliner Independence, and its insurance carrier, Travelers Insurance Company, for a series of accidents through September 2, 1997, and based upon an average weekly wage of $441.85 for 259.38 weeks at the rate of $294.58 per week or $76,408.16, for a 62.5% permanent partial general disability.

As of August 18, 2000, there is due and owing claimant 154.43 weeks of permanent partial compensation at the rate of $294.58 per week in the sum of $45,491.99, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $30,916.17 is to be paid for 104.95 weeks at the rate of $294.58 per week, until fully paid or further order of the Director.

Respondent is ordered to pay all reasonable and related medical expenses.

Future medical is awarded upon proper application to and approval by the Director.

An unauthorized medical allowance of up to $500 is awarded upon presentation to respondent of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

DOCKET NOS. 225,039 & 227,638

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier in both docketed claims to be paid as follows:

Karen Starkey, CSR	
Regular Hearing Transcript	unknown
Hostetler & Associates, Inc.	
Deposition of Vito J. Carabetta, M.D.	$312.00
Deposition of Frank Ise, M.D.	207.00
Martin D. Delmont, C.S.R.	
Deposition of Curtis Todd Thomas	$237.90
Deposition of Stephanie Edens	85.75
Deposition of Jimmy Johnson	66.25
Deposition of Frank H. Ise, M.D.	185.50
Deposition of Michael David, D.O.	165.00
Deposition of Barbara Stewart	245.95
Deposition of William D. Smith, M.D.	198.00

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS
Leigh C. Hudson, Fort Scott, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director